

IN THE HIGH COURT OF F TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 27256 OF 2023

(Arising from Civil Case No. 26205 of 2023 Before Hon. Mwanga, J.)

CHARLES ALFRED MARWAAPPLICANT

VERSUS

THE SKY HORSE GROUP COMPANY LIMITED.. 1ST RESPONDENT

MATHIAS MUGENDI BISENDO2ND RESPONDENT

ALLY OTHMAN SAMA3RD RESPONDENT

FRANK CHRISPIN LIKOTIKO4TH RESPONDENT

RULING

4th & 12th March 2024

MWANGA, J.

This application is about attachment before the judgment and restraining the respondents, their authorized agents, workmen, and any other persons working under their instructions, from removing, selling,

and transferring their properties in the yard area and stores of the 1st respondent, **THE SKY HORSE GROUP COMPANY LIMITED**, and any other properties of the respondents which are not in the yard of the 1st respondents in whatever means pending determination of the main suit.

The application is brought under Order XXXVI Rule 6(l)(a)(b), 6(2), and 7(1), sections 68 and 95, both of the Civil Procedure Code, Cap. 33 [R. E 2019]. It is filed under a certificate of urgency and supported by the affidavit of **Charles Alfred Marwa**, the applicant.

The brief background of the matter is that the applicant raised a loan facility amounting to Tshs. 300,000,000/= being an overdraft loan from NMB PLC for the supply of the mining equipment which are- Brand new JSP290HP6*4, DUMP TRACK make few Model No. CA3224P2K2TIYA80, Brand new JCB Back hoe Loader 3DX Super Engine JCB Diesel, Brand new air compressor machine XAS138KB. It was agreed with the respondents to deliver the machine equipment within 14 days from the date of the payment for consideration.

To secure the loan facility, the applicant mortgaged properties in Plot No. 156 Block "B" located in the Magaka area, and Plot No. 935 Block "A" Semba Street, within the vicinity of Mwanza City as collateral. The loan facility agreement was for 18 months.

Under the agreement, upon payment done by the NMB PLC to the 1st respondent's account, the applicant would be liable to the payment schedule in the installment (monthly payment installment) starting from 22nd February 2022. On 29th November 2021 the second respondent herein served the first Respondent with two proforma Invoices Nos. 225 for the backhoe and 226 for the Dump Truck and air compressor for further money transfer to purchase the mentioned equipment for the applicant to run his mining activities and pay the loan facility advanced per the agreement.

It was also agreed that the second respondent would supply the applicant with three machines/equipment purchased and registered in the name of the applicant, **Charles Alfred Marwa** so that the NMB Bank PLC would use the equipment as well as collateral.

It occurred now that, NMB Bank has started the loan recovery where the properties of the applicant have been placed on sale. Based on that, the applicant filed a suit at High Court Shinyanga against the 2nd Respondent requiring the court to ascertain the contracts for the purchase of the equipment on credit. The Applicant was served with the notice from NMB Bank PLC on the sale of his properties. The 1st, 2nd

3rd, and 4th Respondents were nowhere to be seen in respect of the case at Shinyanga.

However, the case was struck out due to jurisdiction because the agreement was seen to be signed at Dar es Salaam. After the receipt of the order of the court, the applicant filed this suit in Dar es Salaam.

The applicant is contending that, currently there is ill will of the respondents to remove the properties (machine equipment), hence this application.

At the hearing **Mr. Baraka Dishon**, advocate represented the applicant. The respondents though summoned were not able to enter an appearance or file a counter affidavit so the hearing of the application proceeded in their absence.

Submitting in support of the application Mr. Baraka adopted the affidavit of **Charles Alfred Marwa**, the applicant. He submitted that the respondents have shown the intention to part with the properties to wit; Rosther-T. 875 CHF, Exevier T. 216 DDB, Rod Roler T. 261 DKT, Catapiller Motor Grader T. 67 DPD, Motor Vehicle Sanya T. 175 BCW, Eicher T 224 DDD, Eicher T. 21DEF, Eicher TDET, EICHER T. 677 DHC in such a way that if the order of attachment before judgment is not

granted, the order of this court in the main suit if granted in favor of the applicant would be not executable. In addition, he also prayed for the orders that the court appoint the broker to attach the properties pending the determination of the main suit.

I have heard the applicant's counsel. Order XXXVI Rules 6(1) and (2) and 7(1) of the CPC provides for attachment before judgment and, I quote:

"6(1) Where, at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him:

(a) is about to dispose of the whole or any part of his property; or

(b) is about to remove the whole or any part of his property from the local limits of the Jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce

and placed at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

7(1) Where the defendant fails to show cause why he should not furnish security or fails to furnish the security required, within the time fixed by the court, the court may order that the property specified or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

The reading of the provisions above provided insights that, before granting attachment before judgment court should keep in view the principles relating to the attachment before judgment. The outlined principles are that (a) the defendant is about to dispose of the whole or part of his property and; (b) such disposal aims at obstructing or

delaying the execution of any decree that may be passed against him. I would add that, together with the above principles, (c) the court should also satisfy that the applicant's claim is *bonafide* and valid. The purpose is to prevent the end of justice from being defeated.

Upon perusal of the affidavit which is the evidence given by the applicant and which, in essence, has not been controverted, it is apparent that the reasons given for the attachment before judgment pleaded by the applicant are that; **One**, the 2nd 3rd, and 4th respondents have started disposing some of the mining equipment which was in the 1st Respondent's yard. **Two**, though the Respondents do not appear there are properties of the respondents still within the confines of their premises and the Respondents have attempted to remove or hide the said properties from the premises and sell them.

The question now is whether the applicant has met the threshold set by law under Order XXXVI Rules 6(1) (2) and 7(1) of the CPC. I have considered that the power under the respective order is extraordinary. Hence, the applicant shall satisfy the court that the respondents are not only about to remove or dispose of the whole or part of their properties but they are doing so intending to obstruct or delay the execution of any decree that may be passed by this court against them.

With the above holding, I am confident that the application falls short of the test established under the above rule. **First**, the efforts to locate the respondents were considered futile to the extent that this court had to order service to them through substituted service, and the same was published in the Newspaper. Yet the respondents are nowhere to be located as they had failed to appear in court. This alone suffices to say the respondents aren't aware of the proceedings in this court. Given this reasoning, it would be difficult, in my view, to substantiate the claims of the applicant that, the removal or disposal of the equipment (if any) is being done with the intent of obstructing or delaying the execution of any decree that may be passed against the respondents.

The above, notwithstanding, would have been different if the respondents were served and refused the service. **Second**, the properties subject to the attachment were not pleaded in the affidavit of the applicant but rather in the submission of the learned counsel during the hearing of the application. Hence submissions cannot be taken to form part of the evidence of the applicant. The law is settled that submissions from the bar are not evidence. See the cases of **Registered Trustees of the Archdiocese of Dar es Salaam v. The**

Chairman, Bunju Village Government & 11 Others, Civil Appeal No. 147 of 2006 and **Bish International B.V. & Rudolf Teurnis Van Winkelhof v. Charles Yaw Sarkodie & Bish Tanzania Limited**, Land Case No. 9 of 2006 (both unreported).

In the case of **Rosemary Stella Chambejairo Versus David Kitundu Jairo**, Civil Reference No. 6 Of 2018 (CAT-unreported) , the court had this to say;

'In the case of The Registered Trustees of the Archdiocese of Dar es Salaam (supra), the Court held that submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered'.

Given the above, submissions are not expected alone to be the basis of the decision of the court if the same were not pleaded under oath. Since there are no properties listed on the evidence, it would be impossible for the court to ascertain the type of properties and their specific value to assist the court in reaching a fair and equitable decision.

I hasten to state that, the power under the said rule should be strictly applied according to the letter so that the same shall not be used as leverage for coercing the respondents to settle the claims.

That being said and done, the application is not meritorious and, therefore dismissed.

Order accordingly.



H. R. MWANGA

JUDGE

12/03/2024